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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

STATE OF ILLINOIS,

Petitioner,

v.

GREGORY TURNER,

Respondent.

On Petition for a Writ of Certiorari to the Appellate Court of Illinois, First Judicial District

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the exclusionary rule requires that a voluntary confession be suppressed when the suspect was confronted during questioning with evidence seized as a result of an illegal search, even though a confession is not a product of an illegal search and the exclusionary rule can have no real deterrent effect on police misconduct under those circumstances.

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v.

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On Petition for a Writ of Certiorari to the Appellate Court of Illinois, First Judicial District

PETITION FOR A WRIT OF CERTIORARI

Petitioner, the State of Illinois, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Appellate Court of Illinois, First Judicial District, in this matter.

OPINIONS BELOW

The opinion of the Appellate Court of Illinois, First District, Sixth Division, reversing respondent's conviction for first degree murder, is reported as *People v. Turner*, 259 Ill. App. 3d 979, 197 Ill. Dec. 777, 631 N.E. 2d 1236 (1st Dist. 1994) and is reproduced as Appendix A to this petition. The order of the Illinois Supreme Court denying leave to appeal in this matter is reproduced as Appendix B to this petition.

JURISDICTION

The decision of the Appellate Court of Illinois in this matter was entered on March 18, 1994. A timely petition for leave to appeal to the Illinois Supreme Court was filed by petitioner and was denied by the Illinois Supreme Court on October 6, 1994. This Court's jurisdiction is invoked under 28 U.S.C. sec. 1257(3).

CONSTITUTIONAL PROVISION INVOLVED

FOURTH AMENDMENT: The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. . . .

STATEMENT OF THE CASE

Respondent Gregory Turner confessed to stabbing sixteen year old Shirley Taylor to death. During questioning by the police, respondent had been confronted with a pair of bloody shoes found near his bed. The trial judge suppressed evidence of the shoes as the product of an illegal search, but ruled that respondent's confession was voluntary and admissible. Respondent was convicted of first degree murder at a bench trial. The Appellate Court of Illinois reversed respondent's murder conviction, ruling that under the exclusionary rule respondent's confession had to be suppressed because respondent was confronted with illegally seized evidence during questioning. *People v. Turner*, 259 Ill. App. 3d 979, 631 N.E. 2d 1236 (1st Dist. 1994).

Evidence in the Trial Court

On June 9, 1988 the body of high school student Shirley Taylor was found in an alley on the south side of Chicago.

(Tr. 101) She had been stabbed twice in the chest and swabs from her vagina and anus tested positive for semen. (Tr. 415-22)

The Chicago police wanted to talk to respondent, who was a 27 year old parolee, because a friend of the victim had said that Shirley had been afraid of respondent. (Tr. 138) An officer reached respondent on the phone and respondent agreed to come into the station. (Tr. 154) After respondent came into the station on his own, the police talked to him in an interview room and respondent gave the officers an alibi. (Tr. 109, 365-66)

Two detectives then left the station to check out the alibi and, after talking to two of respondent's relatives, found that the alibi was false. (Tr. 110-11) Then the detectives went to respondent's home and talked to his parents. According to the findings of the trial judge, the detectives told respondent's mother that respondent was cooperating in the investigation and that respondent had said that it was okay to search his room. (R. C150)

With the permission of respondent's mother the detectives searched the area in the basement where respondent slept and found a pair of shoes with blood on the soles. (Tr. 114) The detectives asked respondent's mother if they could take the shoes and she said yes. (Tr. 114)

Later a different detective questioned respondent again in the interview room and respondent was told that his alibi did not check out and that bloody shoes had been found by his bed. (Tr. 157, 381) Respondent then confessed that he had killed Shirley Taylor. (Tr. 161-63, 383) He later gave a written confession to a court reporter and an assistant state's attorney. (Tr. 393-94)

In the confession respondent said that on the night of the murder he had sex with Shirley Taylor in his bed in

the basement of his home. (Tr. 396) Afterwards, he left the basement with the victim because she was loudly demanding $30.00 from him. Respondent said that he stabbed the victim because she had threatened to claim that he had raped her, and he was afraid of a rape accusation because he was on parole. (Tr. 397-98)

Trial Court Proceedings

The trial judge suppressed evidence of the bloody shoes found by respondent's bed, finding that the police had told falsehoods to respondent's mother in order to get consent to search. (R. C155) However, the trial judge allowed respondent's confession to go into evidence, ruling that respondent had not been under arrest when he confessed. (R. C153-C154) Also, the judge ruled that the confession had not been caused by the fact that respondent had been confronted with the bloody shoes, since respondent had also been confronted with the fact that his alibi was false. (R. C156-C158)

At trial the theory of the prosecution was that respondent had raped Shirley Taylor and then had killed her when she threatened to tell her mother. (Tr. 421-22) However, the trial judge acquitted respondent of aggravated criminal sexual assault. (Tr. 423-24) But the judge found respondent guilty of first degree murder and respondent was later sentenced to 30 years in custody. (Tr. 447) That conviction was reversed on appeal on the grounds that respondent's confession should have been suppressed under the exclusionary rule since respondent was confronted with illegally seized evidence during questioning. *People v. Turner*, 259 Ill. App. 3d 979, 631 N.E. 2d 236 (1st Dist. 1994).

REASONS FOR GRANTING THE WRIT

THE EXCLUSIONARY RULE DOES NOT REQUIRE THAT A VOLUNTARY CONFESSION BE SUPPRESSED WHEN THE SUSPECT WAS CONFRONTED WITH ILLEGALLY SEIZED EVIDENCE DURING QUESTIONING, SINCE A CONFESSION IS NOT THE PRODUCT OF AN ILLEGAL SEARCH AND BECAUSE THE EXCLUSIONARY RULE CAN HAVE NO REAL DETERRENT EFFECT ON POLICE MISCONDUCT UNDER THOSE CIRCUMSTANCES.

The exclusionary rule is not part of the Fourth Amendment, but is a device created by judges to deter the police from illegally seizing evidence. *Illinois v. Krull*, 480 U.S. 340, 107 S. Ct. 1160, 94 L. Ed. 2d 364 (1987). Therefore the exclusionary rule does not apply to types of cases in which it will not significantly deter police misconduct. *New York v. Harris*, 495 U.S. 14, 110 S. Ct. 1640, 109 L. Ed. 2d 13 (1990); *United States v. Leon*, 469 U.S. 897, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984). This is just such a case. Here respondent Gregory Turner confessed to murder when he was confronted with illegally seized evidence, but the police had no way of knowing in advance that their search would eventually produce an incriminating statement. Seldom if ever will officers anticipate that an illegal search will later lead to a confession. Therefore a voluntary confession should be admissible even when the suspect is confronted with illegally seized evidence during questioning, because the exclusionary rule can have no real deterrent effect on police misconduct under those circumstances.

Certiorari should be granted here to apply this important rule of law. More exactly, certiorari should be granted for the following reasons:

1. The precise question presented by this case (whether a voluntary confession must be suppressed because the suspect was confronted with illegally seized evidence) is an important one which has not been decided by this Court.
2. Nevertheless, the lower court's extension of the exclusionary rule in this case conflicts with a number of decisions of this Court, particularly *New York v. Harris*, 495 U.S. 14, 110 S. Ct. 1640, 109 L. Ed. 2d 13 (1990).
3. There is a conflict of authority among state courts which have considered this issue.

This case illustrates the costs of applying the exclusionary rule when it can have no real effect in deterring violations of the Fourth Amendment.

A.

Certiorari Should Be Granted Because This Case Involves An Important Issue Concerning The Admissibility Of Confessions Which Has Not Been Decided By This Court.

This Court has not decided whether a voluntary confession must be suppressed when the suspect was confronted with illegally seized evidence during questioning. Nevertheless, this is an important legal issue which the defense may attempt to raise in many criminal cases in which a suspect has confessed to a crime. Therefore certiorari should be granted to settle an important constitutional issue about the scope of the exclusionary rule which has not yet been decided by this Court. U.S. Sup. Ct. Rule 10.1(c).

Here respondent's confession to the murder of Shirley Taylor was found to be voluntary and admissible by the trial judge. However, the Appellate Court ruled that the confession had to be suppressed because respondent had

been told during questioning that shoes with blood on them had been found near his bed. *People v. Turner*, 259 Ill. App. 3d 979, 631 N.E. 2d 1236 (1st Dist. 1994). Those shoes had been seized by the police with the consent of respondent's mother, but the trial court found that this consent had been obtained through deceit. The ruling by the Appellate Court of Illinois should be reversed, because it extends the exclusionary rule to a situation when it should not and does not apply.

The exclusionary rule applies to a type of evidence if and only if suppression of such evidence will deter illegal searches and seizures. *New York v. Harris*, 495 U.S. 14, 110 S. Ct. 1640, 109 L. Ed. 2d 13 (1990); *Illinois v. Krull*, 480 U.S. 340, 107 S. Ct. 1160, 94 L. Ed. 2d 364 (1987). Therefore the exclusionary rule does not apply here. A confession is not evidence found during an illegal search and in almost all cases the police will have no idea at the time of a search that they will find evidence which will later lead to a confession. Ordinarily the police will not be able to predict in advance what they will find during a search and they certainly will not be able to predict what effect the evidence would have if mentioned during interrogation of a suspect. Accordingly, there will be no deterrent effect in suppressing a confession because the suspect was confronted with illegally seized evidence during questioning. In almost every case the police will have no idea that a search will produce evidence which will later lead to a confession, so there will be no deterrent effect in suppressing such confessions.

Instead, the way to deter illegal searches and seizures is to suppress the evidence found during those searches, as was done here. The trial judge suppressed evidence of the bloody shoes found by respondent's bed, and petitioner has not challenged that ruling on review. But it

makes no sense to suppress a voluntary confession just because the suspect was told about illegally seized evidence before he confessed. A confession is not evidence found during an illegal search nor is it a predictable result of such a search, so there is no real deterrent effect on police misconduct in suppressing such a confession.

Thirty years ago this Court did come close to deciding whether a confession must be suppressed if the suspect was confronted with illegally seized evidence during questioning. *Fahy v. Connecticut*, 375 U.S. 85, 84 S. Ct. 229, 11 L. Ed. 2d 171 (1963). However, the record in *Fahy* did not show whether the suspect had been confronted with the evidence before his initial confession, so the most this Court said was that such an inquiry would be appropriate on remand. Moreover, the language in *Fahy* concerning the scope of the exclusionary rule is obsolete, since this Court has since held that the exclusionary rule does not apply when it cannot significantly deter police misconduct. See, *e.g.*, *Illinois v. Krull*, 480 U.S. 340, 107 S. Ct. 1160, 94 L. Ed. 2d 364 (1987); *United States v. Leon*, 469 U.S. 897, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984); *United States v. Calandra*, 414 U.S. 338, 94 S. Ct. 613, 38 L. Ed. 2d 561 (1974).

Therefore certiorari should be granted to resolve an important issue which has not previously been decided by this Court. Usually a suspect who confesses to a crime will have been confronted by the police during questioning with the evidence incriminating him. Defense attorneys can always claim before trial that such evidence was illegally seized and, even if few such claims will succeed, such claims certainly will delay trials and consume scarce court time. Thus this Court should hold that a voluntary confession is not made inadmissible by the exclusionary rule even if the suspect was confronted with illegally seized evidence during questioning.

B.

The Extension Of The Exclusionary Rule By The Appellate Court Of Illinois Conflicts With A Number Of Decisions Of This Court.

This Court has clearly and repeatedly held that the exclusionary rule is not part of the Fourth Amendment, but is a remedial device designed to exclude evidence only when exclusion would have the effect of deterring illegal searches and seizures. *New York v. Harris*, 495 U.S. 14, 110 S. Ct. 1640, 109 L. Ed. 2d 13 (1990); *Illinois v. Krull*, 480 U.S. 340, 107 S. Ct. 1160, 94 L. Ed. 2d 364 (1987); *United States v. Leon*, 469 U.S. 897, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984); *Stone v. Powell*, 428 U.S. 465, 96 S. Ct. 3037, 49 L. Ed. 2d 1067 (1976); *United States v. Calandra*, 414 U.S. 338, 94 S. Ct. 613, 38 L. Ed. 2d 561 (1974). In this case the Appellate Court of Illinois extended the exclusionary rule to apply to a situation where it could have no real deterrent effect. Therefore certiorari should be granted because the lower court ruling conflicts with a number of decisions by this Court.

In particular, the Appellate Court's opinion conflicts with this Court's 1990 *Harris* decision, which held that a confession was admissible although the suspect had been unlawfully arrested in his home without a warrant. *New York v. Harris*, 495 U.S. 14, 110 S. Ct. 1640, 109 L. Ed. 2d 13 (1990). *Harris* held that the exclusionary rule does not require that a confession be suppressed in either of the following two situations:

1. When the confession is not the product of the violation of the Fourth Amendment; or
2. When the exclusionary rule would not deter police misconduct.

Both holdings indicate that respondent's confession should have been ruled admissible. Respondent's confession was

not the product of the alleged violation of the Fourth Amendment by the police, nor could the exclusionary rule have any significant deterrent effect under the circumstances of this case.

Here respondent confessed to murder after the police told him that his alibi did not check out and that bloody shoes had been found near his bed. Those shoes had been found and taken by the police with the consent of respondent's mother. Although evidence on the point was conflicting, the trial judge found that the bloody shoes had been seized illegally because the police had given false information to respondent's mother in order to get her consent to search. (R. C154-C155) However, under this Court's reasoning in *Harris*, respondent's confession cannot be considered the product of the Fourth Amendment violation in this case. In *Harris* this Court held that the suspect's confession was not the product of the Fourth Amendment violation, since that violation consisted of arresting the suspect in his apartment without a warrant and the interrogation of that suspect was lawful. Similarly, here the Fourth Amendment violation consisted of a seizure from respondent's home when he was not present, and there was nothing unconstitutional about the interrogation of respondent. In this case the Fourth Amendment protected respondent's house and its contents, but did not bar interrogation of respondent in an effort to get a voluntary confession. Therefore, as in *Harris*, the confession was not the product of the Fourth Amendment violation, so respondent's voluntary confession to murder was admissible.

Also, the exclusionary rule does not apply to respondent's confession because under the circumstances of this case that rule can have no significant effect in deterring police misconduct. When officers search for evidence, they

will not know in advance if they will find evidence which will later lead a suspect to confess. Ordinarily the officers will not know what, if anything they will find during the search. Usually they will not even have a suspect in custody when the search is performed. And almost never will the officers have any way of knowing whether the evidence, if any, found during their search will play a role in leading a suspect to confess. Since the police will not know or expect that an illegal search will produce evidence which will later lead to a confession, the threat of suppressing such confessions cannot deter illegal searches. The exclusionary rule does not apply when it can have no significant deterrent effect. *Illinois v. Krull*, 480 U.S. 340, 107 S. Ct. 1160, 94 L. Ed. 2d 364 (1987). Therefore, the exclusionary rule does not require that a voluntary confession be suppressed, even when the suspect was confronted by illegally seized evidence during questioning.

This is particularly true since the direct and simple way to deter illegal searches is to suppress the evidence seized during them. That is what was done in respondent's case. The trial judge suppressed evidence of the bloody shoes found near respondent's bed, and that evidence was not used at respondent's trial. The State, while it argued in the trial court that the seizure of the shoes was lawful, did not challenge on appeal the suppression of that evidence. There is no need to suppress voluntary confessions which are not the product of illegal searches, when illegal searches may be more effectively deterred by suppressing evidence discovered during them.

To summarize, for two separate reasons described in this Court's *Harris* opinion the exclusionary rule does not require that a voluntary confession be suppressed when the suspect is confronted with illegally seized evidence during questioning. First, a voluntary confession cannot

be considered the product of an unlawful entry into a building, so the exclusionary rule does not apply. Second, under those circumstances the exclusionary rule can have no real deterrent effect, since the police will not know at the time of a search whether they will find evidence which will later induce a confession. Therefore under the Fourth Amendment use of respondent's voluntary confession at his murder trial was lawful.

Attenuation Analysis

Petitioner's main argument for a grant of certiorari is *not* based on the doctrine of attenuation, which provides that a confession may be admissible even following an illegal arrest if the confession is not directly caused by the Fourth Amendment violation. *Rawlings v. Kentucky*, 448 U.S. 98, 100 S. Ct. 2556, 65 L. Ed. 2d 633 (1980); *Brown v. Illinois*, 422 U.S. 590, 95 S. Ct. 2254, 45 L. Ed. 2d 416 (1975). Attenuation provides only an alternative reason for review by this Court. As this Court held in *Harris*, when the exclusionary rule does not apply then there is no need to engage in an attenuation analysis. *New York v. Harris*, 495 U.S. 15, 19, 110 S. Ct. 1640, 1643, 109 L. Ed. 2d 13, 21 (1990). Only when the exclusionary rule applies is there any reason to consider whether intervening circumstances have "purged the taint" of a Fourth Amendment violation. Here the exclusionary rule does not apply to respondent's confession, so it is unnecessary to determine whether the connection between the search and the confession was direct or attenuated.

Brown and other confession cases applying an attenuation analysis involved illegal arrests leading to confessions. See *Dunaway v. New York*, 442 U.S. 200, 99 S. Ct. 2248, 60 L. Ed. 2d 2248 (1979); *Brown v. Illinois*, 422 U.S. 590, 95 S. Ct. 2254, 45 L. Ed. 2d 416 (1975). That is not what

happened here, since the trial judge found that petitioner was not under arrest when he confessed. It is logical to say that a confession may be the product of an illegal arrest, but it makes much less sense to say that a confession is the product of an illegal search which produced only physical evidence. Also, suppressing confessions may be a way to deter illegal arrests, but suppressing confessions will not significantly deter illegal searches of property.

However, assuming for the sake of argument that the doctrine of attenuation did apply here, then the opinion of the Appellate Court of Illinois failed to follow this Court's decisions. The Appellate Court held that a confession must be suppressed when illegally seized evidence "may" have been a factor in the decision to confess. *People v. Turner*, 259 Ill. App. 3d 979, 991, 631 N.E. 2d 1236, 1244 (1st Dist. 1994) (See Appendix A, p. A-18). However, this Court has said that when there are intervening circumstances attenuating a Fourth Amendment violation then a voluntary confession is admissible. *Rawlings v. Kentucky*, 448 U.S. 98, 100 S. Ct. 2556, 65 L. Ed. 2d 633 (1980); *United States v. Ceccolini*, 435 U.S. 268, 98 S. Ct. 1054, 55 L. Ed. 2d 268 (1978). In respondent's case there was such a circumstance, since the detectives also told him that they had checked out his alibi and knew it was false. The Appellate Court of Illinois held that when a suspect is confronted with illegally seized evidence during questioning, then the confession must necessarily be suppressed even if the suspect was also confronted with incriminating evidence that had been lawfully discovered. That holding is contrary to this Court's Fourth Amendment decisions and provides another reason to reverse the Appellate Court's decision.

Summary

During a search of respondent's house the detectives found incriminating evidence, but they certainly did not find respondent's confession there. Accordingly that confession was not the product of the Fourth Amendment violation in this case, so the exclusionary rule did not apply to that confession. Also, the exclusionary rule does not apply because it will have no real deterrent effect on police misconduct under circumstances similar to this case. Certiorari should be granted in order to define the scope of the exclusionary rule and to correct the lower court's failure to follow this Court's decisions.

C.

Certiorari Should Be Granted To Resolve A Conflict Among State Court Decisions On Whether A Confession Must Be Suppressed If The Suspect Has Been Confronted With Illegally Seized Evidence During Questioning.

Another reason why this Court should grant certiorari is that state reviewing courts are divided on the question of whether a voluntary confession must be suppressed where it follows an unlawful search. Several courts have held that a voluntary confession should not be suppressed although it came after an illegal search and seizure. See, *e.g.*, *State v. Manns*, 220 Neb. 426, 370 N.W. 2d 157, 160-61 (1985) (the defendant's confession was not the fruit of an illegal search during which stolen property was recovered where the defendant received *Miranda* warnings and where the defendant's confession was voluntary); *Mays v. State*, 469 N.E. 2d 1161, 1164-65 (Ind. 1984) (although the defendant was confronted with illegally obtained evidence prior to confessing, his confession was admissible where the unlawful evidence was not so psychologically coercive as to have caused the defendant to confess against his free will); *People v. Pierce*, 88 Ill. App.

3d 1095, 411 N.E. 2d 295, 307 (5th Dist. 1980) (any taint from the unlawful search conducted without a valid warrant was removed from the defendant's confession where the defendant was given *Miranda* warnings and his confession was voluntary); and *State v. Rocheleau*, 131 Vt. 563, 313 A. 2d 33, 38-40 (1973) (even though the initial search was illegal, the subsequent confession was properly admitted where it was voluntary).

On the other hand, a number of courts have utilized an analysis similar to the approach employed by the Appellate Court of Illinois in this case. For example, in *State v. Pau'u*, 824 P. 2d 833, 835-37 (Hawaii 1992), the court held that even though the defendant's confession was voluntary in that the defendant understood his right to remain silent and was not coerced into waiving that right, the confession was still inadmissible where it was induced by a prior illegal search. Other relevant cases include *Hart v. Commonwealth*, 269 S.E. 2d 806, 809-10 (Va. 1980) (despite the voluntariness of a confession, it should have been excluded where there was an uninterrupted causal connection between the unlawful seizure of evidence and the confession); *People v. Hines*, 575 P. 2d 414, 416 (Colo. 1978) (confession which followed an unlawful search was inadmissible under the "fruit of the poisonous tree" doctrine where recitation of *Miranda* warnings was insufficient to dissipate the taint of the illegality); and *State v. Verhagen*, 86 Wis. 2d 262, 272 N.W. 2d 105, 109 (1978) (although the confession was voluntary, the confession should have been suppressed where it was an exploitation of a prior illegal search).

A conflict exists among state courts and a decision by this Court would provide much needed guidance on this issue. This Court has never decided a case in which a defendant sought to suppress a confession and the record showed that the defendant had been confronted with il-

legally seized evidence before he confessed. Lafave and Israel, *Criminal Procedure*, sec. 9.4(a), p. 747 (1984). Nothing is more common than for a suspect to confess after the police have confronted that suspect with the evidence against him. Defense attorneys, prosecutors and trial judges would benefit from knowing whether a defendant may seek to have his confession suppressed on the theory that the evidence used during questioning was illegally seized. Certiorari should be granted to decide this important and unresolved issue.

CONCLUSION

Petitioner, the State of Illinois, respectfully requests that a writ of certiorari issue to review the decision of the Appellate Court of Illinois, First Judicial District.

Respectfully submitted,

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APPENDIX A

PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff-Appellee,

vs.

GREGORY TURNER, Defendant-Appellant.

No. 1-91-3226

APPELLATE COURT OF ILLINOIS,
FIRST DISTRICT, SIXTH DIVISION

259 Ill. App. 3d 979; 197 Ill. Dec. 777;
631 N.E.2d 1236

March 18, 1994, Decided

SUBSEQUENT HISTORY: Released for Publication May 5, 1994. Petition for Leave to Appeal Denied October 6, 1994.

PRIOR HISTORY: APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY. HONORABLE THOMAS HETT, JUDGE PRESIDING.

DISPOSITION: Judgment reversed.

JUDGES: McNAMARA, EGAN, GIANNIS

OPINION: JUSTICE McNAMARA delivered the opinion of the court:

Following a bench trial, defendant, Gregory Turner, was convicted of armed violence (Ill. Rev. Stat. 1988, ch. 38, par. 33A-1(b)) and the first degree murder of S. T. (Ill. Rev. Stat. 1988, ch. 38, par. 9-1), and was sentenced to a prison term of 30 years. Defendant appeals, contending that the trial court committed reversible error in denying his motion to suppress inculpatory statements he made

to police two days after the murder, which he argues were induced by virtue of having been confronted with evidence illegally seized from his home shortly before he confessed. In addition, defendant argues that the statements should have been suppressed because they were brought about by the exploitation of an unlawful arrest.

The relevant facts are as follows. On June 10, 1988, defendant gave a confession which may be summarized as follows: On June 8, 1988, after he and the deceased had sex, she demanded $30. They continued to quarrel, and defendant hit her with his fist. When she tried to hit him back, defendant stabbed her.

Defendant filed a motion to quash arrest and suppress evidence, contesting his arrest, the search of his parents' house, the seizure of a pair of blood-stained shoes and a sketch, and the admission of his inculpatory statements. At the hearing on the motion, the State called Detective James Boylan. Boylan testified that at approximately 4:30 p.m. on June 9, he and his partner, Detective Michael Cummings, went to the deceased's home where they interviewed several individuals including a friend named Vetta Cole. Cole informed the detectives that the deceased at one time told her she was afraid of defendant. At approximately 6:30 p.m., Cole accompanied the detectives in their vehicle to defendant's house. They knocked on the door, and defendant's mother answered. Defendant was not at home so they left a business card with her and asked her to tell defendant to contact them. They did not enter the house at that time.

At approximately 11:30 p.m. that night, defendant called the police station and spoke with Detective Lawrence Nitsche. Defendant told Nitsche that he had received the business card, and stated that he would come to the sta-

tion that night. Defendant arrived at 12:30 a.m. with his brother Ricky. Defendant was taken to an interview room, advised of his Miranda rights and interviewed by Boylan and Cummings. Defendant stated he understood his rights, did not ask to have counsel present and expressed a desire to speak with the detectives. Defendant was not handcuffed or restrained. He was awake, alert and coherent, and did not appear to be under the influence of alcohol or drugs. Boylan did not consider defendant to be under arrest at that point. He was uncertain whether he made defendant empty his pockets or whether he went through his wallet.

Defendant told the detectives that on the night of the murder he was with his brother and sister-in-law watching a movie at his brother's home. After receiving this information, Boylan and Cummings went to speak with defendant's brother, who was waiting for defendant in the police station cafeteria. They then went to his brother's home to speak with his sister-in-law. Boylan stated that based upon what his brother and sister-in-law had told them, they did not believe defendant told the truth about his whereabouts on the night in question.

At approximately 2:30 a.m., the detectives went to defendant's house. They knocked on the door, and defendant's parents answered and invited them in. Boylan told them that defendant was cooperating with the police in the investigation of the deceased's murder and that they were questioning him about his whereabouts on the night in question. They asked defendant's mother if she had seen defendant on that particular night. She stated that she heard him come home around 1:30 a.m., go down to the basement where he slept, and leave sometime thereafter. The detectives asked her if they could see where defendant slept, and she and defendant's father took them

to the basement. Boylan could not recall whether they told them that defendant said they could search his room.

The detectives noticed a pair of shoes lying on the floor, and they asked defendant's mother if they belonged to defendant. She responded that they did, and Boylan picked them up and noticed what appeared to be blood stains on the bottom. The detectives asked defendant's mother if they could take the shoes with them, and she said yes. The detectives also observed a drawing on the wall of a woman lying on the floor after having been repeatedly stabbed. When questioned as to what the picture represented, defendant's mother responded that it was something defendant had drawn while in prison. She told the detectives they could take the picture. Defendant's parents did not ask the detectives why they wanted to take the items. Boylan and Cummings then looked through defendant's clothing. They remained in the house for 15 or 20 minutes.

Boylan testified that neither he nor Cummings used any force to enter defendant's house. He acknowledged that they did not have a search warrant.

Boylan and Cummings returned to the station at approximately 3:30 a.m. and, according to Boylan, interviewed defendant again for approximately 20 minutes. Defendant offered no information regarding the deceased's death. During the three-hour period in which the detectives were gone, defendant remained in the interview room with the door open and was not handcuffed or restrained. Boylan did not consider defendant to be under arrest even upon their return at 3:30. Boylan did not tell defendant at any point he could go home, but did not tell him he could not go home. Defendant never asked to leave the station, to use the bathroom, or to have some food or drink. Boylan

acknowledged that the police reports did not indicate either that defendant was advised of his rights until Nitsche questioned him at 8:00 a.m. or that defendant was in fact questioned at 3:30 a.m. After speaking with defendant, the detectives went home.

At the same time Boylan and Cummings were questioning defendant, Nitsche and his partner, Detective Al Wolf, were questioning another man by the name of Saterial Stuttley about the deceased's murder. Stuttley was a former boyfriend of the deceased. In the course of his investigation, Nitsche learned that Stuttley and the deceased had a confrontation the week before her death and that Stuttley had "slapped her around." Stuttley agreed to come voluntarily to the police station for questioning. He arrived at the station between 6:00 and 8:00 p.m. on June 9 and was placed in an interview room. He gave the detectives an alibi for his whereabouts on the night of the murder, and the detectives left to verify it. Stuttley remained in the interview room while they were gone. Stuttley was not placed under arrest, but was advised of his rights prior to giving his alibi. After Stuttley's alibi checked out, Stuttley left the station.

Nitsche acknowledged speaking with defendant on the telephone on June 9 at approximately 11:30 p.m., when defendant called the station looking for Boylan or Cummings. Defendant told Nitsche that a couple of detectives had been at his house in regard to a purse snatching. Nitsche told defendant he did not know about a purse snatching, but that a girlfriend or former girlfriend of his had been found murdered. Nitsche informed defendant that the police were questioning her past acquaintances, and would like to interview him. Nitsche offered to pick him up, but defendant declined and said he would come to the police station on his own. Nitsche then went home.

When Nitsche arrived at work the next morning, defendant was still at the station being questioned. A Sergeant Wilson informed Nitsche that lab tests indicated that human blood had been detected on the bottom of the shoes that were removed from defendant's house. Nitsche was also informed that defendant's alibi did not check out. Shortly thereafter, Nitsche and Wilson went into the interview room and began questioning defendant. Nitsche told defendant his alibi did not check out and that human blood had been found on his gym shoes. Defendant was advised of his rights and indicated he understood them. He expressed a desire to speak with Nitsche, and did not state that he wished to have a lawyer present.

Nitsche's conversation with defendant lasted five or six minutes. After defendant was confronted with the information about his shoes and the fact that his alibi did not check out, Wilson left the room and Wolf entered and began taking notes. Defendant was not handcuffed or restrained, and did not indicate a desire to leave or to use the telephone. At the end of the conversation, defendant was placed under arrest and an assistant State's Attorney was contacted.

At approximately 10:30 a.m., the assistant State's Attorney and Wolf interviewed defendant. Sometime thereafter, defendant gave a formal statement in the presence of the assistant State's Attorney, Nitsche and a court reporter. Prior to defendant giving the statement, the assistant State's Attorney advised him of his rights. Defendant then gave his statement, made corrections to it, and signed it. Thereafter, defendant attempted, unsuccessfully, to assist the detectives in finding his knife.

Defendant's father testified that around 2:30 a.m. on June 10, 1988, he was asleep at home when he heard some-

one banging loudly on the front window. The detectives identified themselves, and he opened the door slightly. The detectives asked him if he knew defendant, and he said that he did. The detectives told him that defendant had given them permission to search the basement. He said nothing at this point, and the detectives then "just pushed the door open and came on in." He did not invite the detectives into the house, nor did they request permission to enter. They did not, however, have their weapons drawn. Once inside, defendant's father opened the basement door and led the detectives down to the basement. Defendant's mother followed. The detectives did not display a search warrant, nor did they tell defendant's parents they had a right to refuse to let them in.

The detectives searched the area of the basement where defendant slept as well as the laundry room. They took with them defendant's gym shoes and the drawing. Neither defendant's father nor mother objected. Defendant's mother testified that she asked the detectives why they were taking the items, and they responded that they wanted to ask defendant a question about the drawing and wanted to see if the gym shoe matched a shoe print that had been left by the assailant.

Defendant's father stated that defendant paid rent to live in the basement, and he considered defendant's area to be private. He stated that he would not go into defendant's area without his permission.

Defendant's mother testified that she spoke with Cummings the evening of June 9. Cummings told her that defendant had assisted in catching a purse snatcher and that his sister was with him at the time. When the sister stated she knew nothing about a purse snatching, the detectives told defendant's mother to have defendant call them when he returned.

When the detectives arrived at defendant's house at 2:30 a.m. the next morning, they asked defendant's mother if they had heard about "the girl," and she said she had. They told her that defendant had given them permission to search his apartment and was being "very cooperative." When it became clear to her that the detectives were planning to take the gym shoes and drawing, she asked them why they needed the items. They stated that the offender wore size 12 shoes and they wanted to compare defendant's shoes with a footprint found near the deceased's body. They also stated they wanted to ask defendant something about the picture. She told the officers they did not need the picture, but they took it and the shoes anyway.

Defendant testified that at 11:50 p.m. on June 9, he and his brother went to the police station. Cummings and Boylan took defendant to an interview room for questioning. Defendant's brother did not accompany him. The door to the room was closed, and Cummings and Boylan asked defendant what he knew about the deceased's murder. Defendant responded that he knew nothing. To defendant's recollection, he was not advised of his rights.

After the detectives asked him some questions, they told defendant to remove everything from his pockets. Defendant asked them whether they were placing him under arrest, to which one of the detectives responded, "just do what I tell you to do." Defendant refused to let them go into his pockets, so they handcuffed him and then searched his pockets, removing his wallet and keys.

After fifteen minutes, the detectives removed defendant's handcuffs and told him to take off his shirt. He eventually put his shirt back on and was again handcuffed. Defendant again asked if he was under arrest and re-

quested a telephone call and an attorney. One of the detectives laughed at him, refusing both requests. When defendant asked why he was not permitted to make a phone call, the detectives left and locked the room, leaving him alone and handcuffed. Defendant considered himself to be under arrest, did not feel free to leave, and was not shown any arrest warrant. This initial interview lasted 15 or 20 minutes.

Cummings and Boylan came back into the room 5 to 10 minutes later, interviewed defendant for another 10 or 15 minutes, then left. Defendant remained handcuffed, and was left alone for several hours. He was not allowed to use the bathroom. At some point, he got up from the chair and kicked the door several times until an officer came to the door. The officer would not let him out of the room so defendant used the floor as a washroom.

Defendant stated that he was intoxicated when he came to the police station. He drank one or two quarts of beer on the way there. When the detectives returned several hours later, they looked into the room and defendant pretended to be asleep. Defendant noticed something in their hands. He overheard them mumble something about "a gym shoe with some blood on it." The detectives then closed the door and left.

Later, defendant, still handcuffed, had a conversation with Nitsche. Nitsche asked defendant what he knew about the murder, and told defendant they had shoes belonging to him which had blood on them. According to defendant, Nitsche stated, "We know you have been through this already, we have the gym shoes; they have blood on them; tell me what you know about them. We know you did it." Nitsche showed defendant the shoes, and he recognized them. Defendant said he did not know what they

were talking about. Nitsche responded, "Come on, you can tell me about it, I know you did it." Defendant again refused to say anything. According to defendant, Nitsche "kept carrying on for twenty to thirty minutes with the same conversation over and over so I got tired of it so I told him come on, whatever you wanted me to sign I would do it, I'm tired of it." He did not give a statement immediately at that point. Nitsche then left the room and did not return for several hours. Defendant stated that he had not slept at all that night. Neither Nitsche nor any other officer physically harmed defendant. When Nitsche returned, he read defendant his rights, talked to him and then took him to see an assistant State's Attorney. The assistant State's Attorney read defendant his rights and defendant then gave a confession in the presence of a court reporter. Defendant did not ask to use the telephone or to have a lawyer present. He testified, however, that he was under the influence of marijuana and beer at the time he gave his formal statement even though it had been at least 12 hours since he had access to either.

Defendant stated that none of the officers asked him if they could search his bedroom. Cummings asked him where he slept and he said in the basement of his parents' house. The detectives then told him they were going to check out his alibi and left.

On cross-examination, defendant stated that he knew before he went to the police station that the police wanted to talk to him about the deceased's murder. Defendant did not recall whether the detectives advised him of his rights when he first arrived, but he did remember Nitsche and the assistant State's Attorney advising him of his rights prior to him giving the oral and written statements.

In response to defendant's motion, the trial court issued a 12-page written order on February 15, 1991. The court found defendant's testimony to be incredible where it conflicted with that of the police. The court, however, believed the testimony of defendant's parents over that of the detectives on the issue of whether the detectives told them, falsely, that defendant was cooperating with the police and had given them permission to search his room. It was primarily on this basis that the court held that the house had been illegally searched, and the shoes and drawing illegally seized. The trial court granted defendant's motion to suppress the items at trial.

The court determined that defendant's arrest did not occur until shortly after 8:00 a.m. when he began to tell Nitsche the facts surrounding the murder. It was at this point, the court concluded, that the police acquired probable cause. In determining the time of the arrest, the court gave great weight to the fact that defendant came voluntarily to the police station knowing the police wished to speak with him about the deceased's murder, agreed to speak with police, gave a phony alibi, and knew that Boylan and Cummings left the station to check out his alibi. The court also found significant the fact that he was never told he could not leave the station. Finally, the court placed great importance on its finding that defendant never testified that he believed he was not free to leave. (This latter finding, however, was erroneous because defendant did in fact so testify.) The court found that under the totality of the circumstances, a reasonable man would not conclude that he was not free to leave the police station between 3:30 a.m. and 8:00 a.m.

The trial court denied defendant's motion to suppress his confession statements, after finding that the statements were not obtained by exploitation of the unconstitu-

tional search and seizure or by exploitation of an unlawful arrest. Rather, the court found that defendant's confession was induced by his learning his alibi did not check out.

At trial, the State called a number of witnesses including Cummings. Cummings testified that he and Boylan interviewed defendant at the station at approximately 12:30 a.m. on June 10 as part of their investigation of the murder. Cummings and Boylan asked defendant several questions, which he answered. Defendant told the detectives that he had last seen the deceased around 3:00 or 3:30 p.m. on June 8. She was supposed to come to his house at approximately 4:45 p.m. that day but never showed up. When she did not show up, defendant went next door to his cousin's house where he remained until 7:00 p.m. After that, he took a bus to his brother's house, where he remained until approximately 3:00 a.m. the next day, June 9.

In an attempt to verify defendant's story, Cummings and Boylan spoke with his brother Ricky, who had driven defendant to the station and remained there while defendant was being questioned. They asked him whether he had seen his brother on June 8 and 9. Later, they drove to Ricky's home where they questioned his wife as to whether she had seen defendant on June 9. Cummings and Boylan then went to defendant's house and questioned his mother.

At approximately 3:00 or 4:00 a.m., Cummings and Boylan returned to the station. According to Cummings, they did not speak with defendant again because he was asleep.

Nitsche also testified for the State, and his testimony was substantially similar to that given at the hearing on the motion to suppress. At the end of his testimony, Nitsche

read aloud the contents of defendant's court-reported statement. The trial court subsequently found defendant guilty of armed violence and murder.

Defendant contends that his inculpatory statements should have been suppressed because they were brought about by exploiting the illegal search of his house and seizure of his gym shoes. Defendant argues that the police induced his confession by confronting him with their knowledge of the shoes, which they told him were stained with human blood. The trial court disagreed, holding that defendant's confession was a product of his own free will and was sufficiently attenuated from the illegal search and seizure so as to be purged of its taint. In so holding, the trial court placed almost exclusive reliance on the fact that defendant first learned of the bloody shoes at 3:30 a.m. and did not confess at that time. The court reasoned that defendant's failure to confess when first confronted with the knowledge of the illegally-seized evidence at 3:30 ruled out any possibility that it induced him to later confess at 8:00 a.m. In its order, the court concluded:

> "We know that the defendant knew of the seizure before Boylan and Cummings spoke to him around 3:30 A.M. And if [defendant] had confessed at that time, no other reasonable interpretation could be made except that the confession came about because of confronting the defendant with the knowledge gained by the illegal search and seizure. But, that did not happen. [Defendant] did not confess then.
>
> * * *
>
> There is no evidence that Boylan and/or Cummings told [defendant], at 3:30, that his alibi did not wash. The only evidence is that this fact was related to him for the first time at 8:00 A.M. when Nitsche spoke to [defendant]. At that same time, the fact that the blood covered gym shoes had been seized was also related to defendant, but, it is reasonable to conclude

> that since knowledge of the gym shoes didn't induce a confession at 3:30, it was not the inducement that brought about the confession at 8:00 A.M. The only inducement remaining is that [defendant] confessed after learning his brother and sister-in-law did not back up his alibi."

On appeal, the State urges this court to affirm the trial court's finding that the connection between the illegal search and seizure and defendant's later inculpatory statements was sufficiently attenuated.

At the outset, we note that a reviewing court will not disturb the trial court's rulings or factual findings on a motion to suppress unless they are against the manifest weight of the evidence. (*People v. Booker* (1991), 209 Ill. App. 3d 384, 568 N.E.2d 211, 154 Ill. Dec. 211.) In determining the propriety of the trial court's denial of a motion to suppress, the reviewing court is free to look to the trial testimony as well as the evidence presented at the hearing on the motion to suppress. (*People v. Stewart* (1984), 104 Ill. 2d 463, 473 N.E.2d 1227, 85 Ill. Dec. 422.) We are mindful that it is the trial court's duty to resolve conflicts in the evidence and to judge the credibility of witnesses (*People v. Fauntleroy* (1991), 224 Ill. App. 3d 140, 586 N.E.2d 292, 166 Ill. Dec. 334), and accordingly we will not substitute our judgment for that of the trier of fact as to these issues, absent palpable error. *People v. Stachelek* (1986), 145 Ill. App. 3d 391, 495 N.E.2d 984, 99 Ill. Dec. 249.

After carefully reviewing the record, we must conclude that the trial court manifestly erred in denying defendant's motion to suppress his confession statements because the factors underlying its ruling are not supported by the evidence. That defendant, as the trial court found, had an opportunity to confess at 3:30 a.m. after learning

of the shoes, but did not, is not borne out by the record. Accordingly, the trial court's reasoning that "since knowledge of the gym shoes didn't induce a confession at 3:30, it was not the inducement that brought about the confession at 8:00 A.M." must be rejected.

To support the above reasoning, the trial court relied on the testimony of Boylan, who stated that when he and Cummings returned to the station at 3:30 a.m. after searching defendant's bedroom and seizing his shoes, they interviewed defendant and he offered no information about the murder. The trial court inferred from this testimony that the interview occurred after defendant learned the police had his shoes, and concluded that since defendant remained silent about the murder during the interview knowing what he knew about the shoes, his knowledge of the shoes was not the impetus which compelled him to later confess. We do not consider the trial court's inference as to the timing of the interview to be reasonable under the circumstances because the totality of the evidence indicates that a 3:30 interview with defendant did not, in fact, occur.

Although Boylan testified that the interview took place, he gave no details of the content of that interview other than its duration and the fact that defendant offered no information about the murder. Nowhere else in the record is there any indication as to what was said during that interview. Defendant mentioned nothing about a 3:30 interview in his testimony. He stated only that when the detectives returned to the station several hours later, they looked into the room and he pretended to be asleep. He stated that he noticed something in their hands at this point and overheard them mumble something about "a gym shoe with some blood on it." According to defendant, the detectives then closed the door and left.

The State argues that it was within the trial court's discretion to disbelieve defendant's testimony, and while that is true, the absence of testimony concerning a 3:30 interview is, in our view, relevant to the issue at hand, namely, whether he had an "opportunity" to confess at 3:30 a.m. or whether, as the record tends to indicate, he was left alone until 8:00 a.m. when the police questioned him for the first time after seizing the bloodstained shoes.

Even ignoring defendant's testimony in this regard, other evidence in the record supports a finding that no 3:30 a.m. interview with defendant took place. For instance, while detailing virtually every other aspect of the investigation including the 12:30 a.m. meeting with defendant on June 10, the interviews of defendant's brother and sister-in-law, the visit to defendant's house at 2:30 a.m., and defendant's 8:00 a.m. interview with Nitsche and then with the assistant State's Attorney, the written police reports make no mention of a 3:30 a.m. interview with defendant. The only 3:30 a.m. activity discussed was the delivery of the shoes to the crime lab for testing. According to the reports, the first time defendant was confronted by the police after he learned of the blood-stained shoes was at 8:50 a.m., when "Det. Niteche and Sgt. Wilson confronted [defendant] with the facts that * * * the stains on his shoes were human blood and that * * * his alibi was not substantiated."

Perhaps most enlightening is the trial testimony of Cummings, Boylan's partner. Cummings testified as follows:

> "MR. KOIVUN [Defense counsel]: Detective Cummings, you interviewed the defendant on two occasions on the morning of the 10th?
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> * * *
>
> CUMMINGS: I thought we just interviewed him the one time.

MR. KOIVUN: Just the one time?

CUMMINGS: Yes.

MR. KOIVUN: That was approximately what time of the morning?

CUMMINGS: It was after midnight, probably about 12:30.

MR. KOIVUN: Okay. After you * * * talked to [defendant's brother and sister-in-law], and had gone to the defendant's parents' house, did you have an occasion to talk to or attempt to interview the defendant again?

* * *

CUMMINGS: I don't remember that we talked to him at all after that.

* * *

MR. KOIVUN: So, to the best of your recollection, you * * * did not interview [defendant] for the second time, any time after that initial interview?

CUMMINGS: I don't believe I did, no.

MR. KOIVUN: Did you ever indicate to the defendant after checking out or speaking to [defendant's brother and sister-in-law], did you ever speak to him about the alibi he had given?

CUMMINGS: I don't believe we talked to him. When we came back to him, he was asleep, when we came back to the office.

* * *

MR. KOIVUN: How about Detective Boylan? Did Boylan say anything to him?

CUMMINGS: I don't believe he did. I can [sic] say for positive. I was with Boylan most of the time, but I don't think he did, because we had commented about how he was asleep." (Emphasis added.)

As the foregoing demonstrates, the manifest weight of the evidence reveals that Boylan and Cummings did not

in fact speak with defendant at 3:30 a.m. Accordingly, we must reject the trial court's factual finding that "the defendant knew of the seizure before Boylan and Cummings spoke to him around 3:30 a.m." Relying on this finding, the trial concluded that had defendant confessed at that time, "no other reasonable interpretation could be made except that the confession came about because of confronting the defendant with the knowledge gained by the illegal search and seizure." If, as the evidence indicates, the first interview following the revelation of the illegal evidence did not occur until 8:00 a.m. when defendant was confronted with the shoes as well as the fact that his alibi did not check out, then the first "opportunity" for defendant's knowledge of the gym shoes to induce a confession was not at 3:30 a.m., but at 8:00 a.m.

The State argues that it was the knowledge that his alibi proved to be false which induced defendant to confess to the murder at 8:00 a.m. While that knowledge may have played a part in defendant's decision to confess, it is probable that his knowledge that the police recovered his blood-stained shoes also played a part. In the past, we have indicated that if a defendant's knowledge that illegally-seized evidence was recovered *may* have been a factor in his decision to confess, then suppression is proper. (*People v. Nash* (1979), 78 Ill. App. 3d 172, 397 N.E.2d 480, 34 Ill. Dec. 24; see also *People v. Rodriquez* (1967), 79 Ill. App. 2d 26, 223 N.E.2d 414.) As a general rule, " 'confronting a suspect with evidence tends to induce a confession by demonstrating the futility of remaining silent.' " *People v. Robbins* (1977), 54 Ill. App. 3d 298, 369 N.E.2d 577, 12 Ill. Dec. 80. Citation omitted.

The State attempts to distinguish *Robbins*, *Nash* and *Rodriguez*, in our view unsuccessfully, and argues that we should affirm the trial court's finding of attenuation

on the basis of the four-prong analysis set forth in *Brown v. Illinois* (1975), 422 U.S. 590, 95 S. Ct. 2254, 45 L. Ed. 2d 416. In *Brown*, the Supreme Court held that the question whether a confession has been obtained by exploitation of some prior illegal police action (in that case, an illegal arrest) depends upon all the facts of each case. Among the factors which must be considered are: (1) whether the Miranda warnings were given, (2) the temporal proximity of the primary illegality and the confession, (3) the presence of intervening circumstances, and (4) the purpose and flagrancy of the official misconduct. (*Brown*, 422 U.S. at 603-04, 95 S. Ct. at 2261-62, 45 L. Ed. 2d at 427.) Once a defendant establishes the illegality of the police conduct and shows its connection to what is alleged to be the fruit of that illegality, the State has the burden of proving by clear and convincing evidence that the challenged evidence—in this case, defendant's inculpatory statements—was obtained by means sufficiently distinguishable to be purged of the primary taint. (*People v. Graham* (1991), 214 Ill. App. 3d 798, 573 N.E.2d 1346, 158 Ill. Dec. 161.) The State contends that it has met this burden here.

It is undisputed that defendant received Miranda warnings prior to confessing to the murder. The giving of Miranda warnings, however, does not alone and per se purge the taint of an illegal seizure. *Graham*, 214 Ill. App. 3d at 813, 573 N.E.2d at 1355; *People v. Townes* (1982), 91 Ill. 2d 32, 435 N.E.2d 103, 61 Ill. Dec. 614, 435 N.E. 2d 103.

As to the temporal proximity factor, the record indicates that approximately five and a half hours elapsed between the "primary illegality," that is, the illegal search and seizure, and the defendant's confession, and four and a half hours elapsed from the time defendant learned of the illegally-seized shoes. The State argues that "since defendant learned of the seizure at 3:30 a.m., but did not con-

fess to murder till after 8:00 a.m., enough time passed to indicate the illegal activity did not cause defendant to confess." The fact that defendant did not confess until 8:00, however, is only significant if, as discussed above, he had an opportunity to confess earlier but did not, notwithstanding his knowledge of the illegally-obtained evidence. Thus, in this context, the mere passage of time between the illegal search and seizure and the confession does not by itself, or in conjunction with the giving of Miranda warnings, purge the taint of the illegality.

As is often the case in the context of a confession following an illegal arrest, the key in determining whether the passage of time has purged the taint of illegal police conduct is to examine what, if any, intervening events occurred during that time, and the nature of those events. (*People v. Stofer* (1989), 180 Ill. App. 3d 158, 534 N.E.2d 1287, 128 Ill. Dec. 682.) The same can be said in this context, where the confession follows an illegal search and seizure of property.

An intervening circumstance is one that dissipates the taint of the unconstitutional police conduct by breaking the causal connection between the illegal conduct and the confession. The confrontation of a suspect with new information, untainted by the illegality, has been identified as an intervening circumstance that may produce a voluntary desire to confess and thereby support the admission of a confession. (*People v. Lekas* (1987), 155 Ill. App. 3d 391, 508 N.E.2d 221, 108 Ill. Dec. 60.) The trial court found that defendant's confession was induced with such "new information," namely, the knowledge that his alibi did not check out. For the reasons set forth above, however, we do not agree. As the evidence indicates, the first confrontation between defendant and the police after defendant learned of the shoes was shortly after 8:00 a.m., when Nitsche also informed him that his alibi did not

check out. As defendant correctly points out, for the alibi to be an intervening circumstance, the State must prove that it was solely the unsubstantiated alibi which led to the confession, and that being confronted with the illegally-obtained evidence did not enter into defendant's decision to confess. We do not believe the State has met this burden. Indeed, the trial court itself acknowledged that had defendant confessed to the murder during questioning by police at 3:30, after learning of the shoes, then "no other reasonable interpretation could be made except that the confession came about because of confronting the defendant with the knowledge gained by the illegal search and seizure." Since such questioning did not occur until later that morning, at 8:00, and since defendant did in fact confess to the murder then, we can reasonably presume that defendant's knowledge of the shoes played a factor in his decision to confess at the first opportunity to do so following the illegal seizure.

As to the final *Brown* factor, the purpose and flagrancy of the police conduct, the State relies heavily on the fact that the police did not use force to obtain the evidence. It also relies on the fact that "any flagrant conduct which did exist was directed toward another, not the defendant." To our knowledge, however, the show of force is not a sine qua non to a finding of flagrancy or purposefulness. In our view, the deceit displayed by the police to secure the illegal evidence from defendant's house in the middle of the night constitutes a certain degree of flagrancy. Indeed, their conduct was sufficient for the trial court to suppress the seized evidence at trial. Moreover, although the State does not discuss the purposefulness of the police conduct, it is apparent to us that the police, in going to defendant's house at 2:30 a.m., were on an expedition for incriminating evidence to be used against defendant. No other reason for the visit to defendant's house at that

time of day has been suggested by the State. Nor has the State offered an explanation as to why the police even confronted defendant with their knowledge of the blood-stained shoes, or why they told him additional tests were being conducted to determine whether the blood found on the shoes matched that of the deceased. There can be no other reasonable explanation, in our view, other than that the officers intended for these statements to induce a confession, thereby establishing the probable cause necessary to effectuate defendant's arrest.

In view of the foregoing, we conclude that defendant's inculpatory statements were not obtained by means sufficiently distinguishable from the illegal search of his house and seizure of his shoes as to be purged of the taint arising from that illegality. (See *Wong Sun v. United States* (1963), 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441.) The totality of the evidence indicates that the police exploited the "fruits" of the illegal search and seizure to force a confession from defendant. Under these circumstances, we hold that the State has failed to meet its burden of proving, by clear and convincing evidence, that defendant's confession was a product of his free will, independent of the taint of the illegal search and seizure. (*Lekas*, 155 Ill. App. 3d at 411, 508 N.E.2d at 235; see also *Wong Sun*, 371 U.S. at 486, 83 S. Ct. at 416-417, 9 L.Ed.2d at 454.) Accordingly, defendant's inculpatory statements must be suppressed.

In light of our holding, we need not address defendant's additional contention that his statements should have been suppressed as the products of an unlawful arrest.

For the foregoing reasons, the judgment of the circuit court of Cook County is reversed.

Judgment reversed.

EGAN, P.J., and GIANNIS, J., concur.

APPENDIX B

ILLINOIS SUPREME COURT
JULEANN HORNYAK, CLERK
SUPREME COURT BUILDING
SPRINGFIELD, ILL. 62706

October 6, 1994

No. 77131—People State of Illinois, petitioner, v. Gregory Turner, respondent. Leave to appeal, Appellate Court, First District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on October 28, 1994.

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Supreme Court, U.S.
FILED
DEC 29 1994
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No. 94-993

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1994

PEOPLE OF THE STATE OF ILLINOIS,

Petitioner,

-vs-

GREGORY TURNER,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
APPELLATE COURT OF ILLINOIS, FIRST DISTRICT

RESPONDENT'S BRIEF IN OPPOSITION

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No. 94-993

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October Term, 1994

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-vs-

GREGORY TURNER,

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ON PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT

RESPONDENT'S BRIEF IN OPPOSITION

Respondent, Gregory Turner, respectfully requests that this Court deny the petition for writ of certiorari seeking review of the Illinois Appellate Court's opinion in this case. That decision is reported at 259 Ill. App. 3d 979, 631 N.E.2d 1236 (1st Dist. 1994).

STATEMENT OF THE CASE

The following pertinent facts are omitted from the petition:

Respondent called the police in response to a message the police had left with his parents that they were investigating a purse snatching and the respondent was the friend of the victim.

(R. 103) Respondent arrived at the police station at about 12:30 a.m.. (R. 105, 120) He remained in an interrogation room at the station and was subjected to intermittent questioning until he confessed at about 8 a.m.. (R. 116-17, 136-37, 155-57, 170-71, 181-84, 186)

The trial court suppressed the gym shoes as evidence not only on the ground that the consent of his parents to the search of respondent's room had been obtained by fraud, but also because it credited the evidence that respondent was a tenant in his parents' home and they had no authority to consent to a search of their son's room. (R. 154-56) Respondent and his parents testified that he rented the basement of his parents' house and they did not enter that area without his permission. (R. 212-13, 218, 227)

Petitioner argued in the appellate court that respondent's confession was admissible because it was the product of his being confronted with the fact that the police could not substantiate his alibi. State's Brief 20. Petitioner asked the Illinois Supreme Court to review the appellate court's decision on the ground that the appellate court had adopted a per se rule that whenever a defendant is confronted with evidence obtained through an unlawful search, a subsequent confession must be suppressed as the fruit of that search regardless of whether the defendant is also confronted with lawfully obtained evidence. Petition for Leave to Appeal 7.

REASONS WHY THE PETITION SHOULD BE DENIED

This Court has accepted that if a suspect's confession is induced by knowledge that the police had seized incriminating evidence, and that evidence was unlawfully seized, the confession is suppressible as the fruit of the unlawful seizure. Fahy v. Connecticut, 375 U.S. 85, 90-91 (1963). Consistent with Fahy, courts have found it to be obvious that a confession produced by confronting a suspect with evidence which is illegally seized is the fruit of that illegality. United States v. Nafzger, 965 F.2d 213, 217 (7th Cir. 1992); Ruiz v. Craven, 425 F.2d 235, 236 (9th Cir. 1970); Amador-Gonzalez v. United States, 391 F.2d 308, 318 (5th Cir. 1968); United States v. Marrese, 336 F.2d 501, 504 (3rd Cir. 1964). Petitioner provides this Court with no reason to revisit this question.

IF THE EXCLUSIONARY RULE DID NOT APPLY TO CONFESSIONS PRODUCED BY CONFRONTING A SUSPECT WITH ILLEGALLY SEIZED EVIDENCE, LAW ENFORCEMENT OFFICIALS WOULD BE ENCOURAGED TO CONDUCT UNLAWFUL SEARCHES TO OBTAIN INCRIMINATORY EVIDENCE WHICH COULD THEN BE EMPLOYED TO INDUCE A SUSPECT TO CONFESS.

Petitioner contends that application of the exclusionary rule to a confession obtained by confronting a suspect with unlawfully obtained evidence will not deter police misconduct, because the police cannot predict what evidence they might find during an unlawful search and therefore will not know in advance that they will obtain evidence which will produce a confession.

It is true that when police conduct an illegal search they may not know or even anticipate what evidence they might find.

This Court has never been tolerant of violations of the Fourth Amendment on the ground that the police acted with the hope rather than the expectation or certainty that evidence of a crime would be discovered. That the purpose of the police in conducting a search is purely exploratory may exacerbate rather than mitigate the Fourth Amendment violation. Andresen v. Maryland, 427 U.S. 463, 480 (1976) (general warrants which authorize an exploratory rummaging in a person's belongings violate the Fourth Amendment).

The need to deter police misconduct which fortuitously results in the discovery of evidence is no less than the need to deter misconduct which is preceded by knowledge that incriminating evidence will result. In either instance, law enforcement acts illegally and it is that illegal conduct, independent of the certainty that incriminating evidence will be unlawfully obtained, that the exclusionary rule is intended to deter.

Petitioner acknowledges that "[n]othing is more common than for a suspect to confess after the police have confronted that suspect with the evidence against him," Petition 16, and "[u]sually a suspect who confesses to a crime will have been confronted by the police during questioning with the evidence incriminating him." Petition 8. These admissions belie petitioner's claim that the police will not be motivated to conduct unlawful searches in an effort to obtain incriminating evidence with which they might confront the suspect and obtain a

confession. If the police routinely confront suspects with evidence to produce a confession, at least part of their motivation in conducting a search where they have a suspect is to obtain a piece of evidence which could result in an incriminating statement.

Creation of a rule refusing to apply the exclusionary rule to a confession produced by confronting a suspect with unlawfully obtained evidence will promote police misconduct and encourage Fourth Amendment violations. If the police know that their misconduct will result only in suppression of the evidence obtained during the search, but any confession obtained by confronting the suspect with that evidence will not be suppressed as the fruit of the illegality, they will be motivated to conduct unlawful searches in the hope of uncovering some incriminating evidence which can be employed to induce the suspect to confess. The confession will often constitute the more convincing and conclusive evidence of the suspect's guilt, while the evidence obtained during the unlawful search may be less probative of guilt and expendable from the viewpoint of the police and prosecution. See Fahy, 375 U.S. at 90 (noting that the defendants' confessions were more damaging than the illegally seized evidence).

The case at bar presents a compelling demonstration. Suppression of the bloody shoes, but not the confession, rewarded the police for violating respondent's rights. The police went to respondent's home for no apparent purpose other than to illegally

uncover some evidence which might connect respondent to the offense. They conducted an unlawful search, obtained incriminating evidence, and then confronted the respondent with that evidence during an interrogation session, resulting in respondent's confession. The confession provided sufficient evidence to convict respondent. The bloody shoes seized during the unlawful search became expendable. Had the appellate court not ordered the confession suppressed, the police would be encouraged to follow these same tactics in the future with little fear of jeopardizing convictions.

Decisions of this Court concluding that the exclusionary rule does not extend to circumstances in which its application would have no deterrent effect do not conflict with application of the exclusionary rule to a confession which is the product of an unlawful search. This Court has refused to apply the exclusionary rule where a law enforcement officer reasonably relies on a statute or a warrant authorizing a search, even though the statute is later held unconstitutional or the warrant ultimately found defective, because the officer could not have known that his conduct was unlawful. Illinois v. Krull, 480 U.S. 340 (1987); United States v. Leon, 468 U.S. 897 (1984).

An officer's objectively reasonable reliance on a statute or a warrant authorizing his conduct is not at all analogous to the circumstances at bar, where the police conducted what they knew to be an unlawful search of respondent's room with the hope of uncovering evidence connecting respondent to the offense. The

police did not reasonably believe that their conduct was lawful. They knew that respondent had not authorized a search of his room, as they represented to his parents. They used that subterfuge to gain access to respondent's room to conduct a search for evidence without a warrant or probable cause.

This Court concluded in Leon and Krull that application of the exclusionary rule would not serve the objective of deterrence because police officers cannot be expected to question the judgment of the legislature or a magistrate. The police did not rely on the judgment of a legislature or a magistrate in conducting their search of respondent's room. They intentionally engaged in misconduct to discover evidence of respondent's guilt and did not act in good faith. As their misconduct was purposeful, application of the exclusionary rule to the fruits of their unlawful conduct would promote the deterrent purpose of the rule.

BECAUSE THE POLICE OBTAINED RESPONDENT'S CONFESSION BY EXPLOITATION OF THE UNLAWFUL SEARCH, AND THE CONFESSION WAS NOT OBTAINED INDEPENDENT OF THAT ILLEGALITY, SUPPRESSION OF THE CONFESSION DOES NOT CONFLICT WITH THIS COURT'S DECISION IN NEW YORK V. HARRIS THAT THE EXCLUSIONARY RULE DOES NOT APPLY TO EVIDENCE WHICH IS NOT THE PRODUCT OF THE FOURTH AMENDMENT VIOLATION.

In New York v. Harris, 495 U.S. 14 (1990), this Court refused to extend the exclusionary rule to confessions made by a defendant at the police station after he had been arrested at his home in violation of Payton v. New York, 445 U.S. 573 (1980) without a warrant and in the absence of exigent circumstances,

but with probable cause. The Court reasoned that Payton was designed to protect the physical integrity of the home and was not intended to grant a criminal suspect protection for statements made outside his premises where the police have probable cause to arrest the suspect for committing the crime. 495 U.S. at 17. The continued custody of a suspect arrested in a home but without a warrant is not unlawful once he is removed from the house. Id. at 18. Therefore, a confession made at the station after the police remove the suspect from the house is not the product of the unlawful entry into the home which can be challenged as the fruit of an illegality, because it is not the fruit of the arrest being made in the house rather than somewhere else. Id. at 20.

Harris is not analogous to the instant case. In Harris, the illegality was confined to the entry into the home. Harris' detention and interrogation at the station was not tainted by that illegality and was independently supported by probable cause. There was nothing wrong about the police having control of his person at the time they conducted the interrogation. The police did not exploit the illegal entry into the home to obtain the statement.

Unlike Harris, the unlawful search of respondent's room and the seizure of the bloody shoes did taint the interrogation the police conducted of respondent. Respondent's confession was come at by exploitation of that illegality. The police produced the confession by confronting respondent with evidence which they

illegally obtained. The illegality was not confined to the unlawful search at the home but continued when the police confronted respondent with the shoes, as the police were not in lawful possession of that evidence.

Nothing in Harris suggests that if the police had obtained Harris' confession at the station by exploitation of evidence illegally seized from his home, the Court would not have found the confession to be the suppressible fruit of the illegal entry. In fact, the Court cautioned that it was not holding that a statement taken while a suspect is in custody is always admissible as long as the suspect is in legal custody. Id. at 20.

THERE IS NO CONFLICT OF STATE AUTHORITY REGARDING WHETHER A CONFESSION MAY BE THE FRUIT OF AN UNLAWFUL SEARCH WHICH THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE.

Petitioner represents that state reviewing courts are divided on the question of whether the exclusionary rule applies to a confession which is the product of an unlawful search. It cites State v. Manns, 220 Neb. 426, 370 N.W.2d 157 (1985), Mays v. State, 469 N.E.2d 1161 (Ind. 1984), People v. Pierce, 88 Ill. App. 3d 1095, 411 N.E.2d 295 (5th Dist. 1980) and State v. Rocheleau, 131 Vt. 563, 313 A.2d 33 (1973), as decisions in which state courts have concluded that the exclusionary rule has no application to such confessions. Petitioner has misinterpreted the holdings of those cases. In none of those cases did the courts conclude that the exclusionary rule was inapplicable.

Manns, Pierce and Rocheleau do not question that a

confession can be the fruit of an unlawful search and seizure. Rather each court engaged in a fruits analysis and concluded that the confession was not tainted by the illegality. Rocheleau, decided prior to Brown v. Illinois, 422 U.S. 590 (1975), concluded that the giving of Miranda warnings attenuated the taint of the illegal search, not that a confession which was the fruit of an unlawful search was not subject to an attenuation analysis. 313 A.2d at 38-40.

In Mays, the court held that defendant's confession was voluntary notwithstanding that it was obtained by confronting defendant with illegally seized evidence. 469 N.E.2d at 1165. It is not at all apparent that the court even purported to address whether admission of the confession violated the Fourth Amendment.

As petitioner has failed to demonstrate that courts are in conflict on the issue of whether the exclusionary rule has application to a confession obtained by confronting a suspect with illegally seized evidence, petitioner is incorrect that courts are in need of guidance on this issue and a grant of certiorari is not warranted.

THE APPELLATE COURT'S OPINION THAT PETITIONER FAILED IN ITS BURDEN OF PROVING ATTENUATION IS CONSISTENT WITH THIS COURT'S DECISIONS.

Petitioner asserts that an alternative basis for this Court to grant certiorari is that the appellate court's finding of no attenuation between the confession and the Fourth Amendment

violation is contrary to this Court's decisions. Petition 12-13.

Petitioner does not dispute that it bore the burden of proving that respondent's confession was not obtained by exploitation of the illegal search. The appellate court reasoned that because respondent was confronted with both the bloody shoes as well as the failure of his alibi immediately before he confessed, and it could not be ascertained that the confession was solely the product of the knowledge that his alibi was unsubstantiated, rather than also being influenced by the confrontation with the shoes, the petitioner failed in its burden of establishing an intervening circumstance. People v. Turner, 259 Ill. App. 3d 979, 631 N.E.2d 1236, 786 (1st Dist. 1994).

It is certainly reasonable to conclude that respondent's knowledge that the police had discovered the bloody shoes, rather than his awareness that the police could not verify his alibi, would provide the impetus for respondent to confess. Knowledge that the police uncovered evidence incriminating a suspect ordinarily would generate greater pressure on a suspect to confess than would knowledge that the suspect had not convinced the police of his innocence. As the appellate court's analysis is consistent with this Court's decision in Brown v. Illinois, 422 U.S. 590, 603-04 (1975) and Rawlings v. Kentucky, 448 U.S. 98 (1980), it should not be disturbed.

CONCLUSION

For these reasons, the petition for writ of certiorari should be denied.

Respectfully Submitted,

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No. 94-993

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1994

PEOPLE OF THE STATE OF ILLINOIS,

Petitioner,

-vs-

GREGORY TURNER,

Respondent.

NOTICE OF MOTION AND PROOF OF SERVICE

To: Roland Burris, Attorney General, 100 West Randolph St., 12th Floor, Chicago, Illinois 60602
Jack O'Malley, State's Attorney, Cook County, 300 Daley Center, Chicago, Illinois 60601

Please take notice that on December 29, 1994, I mailed the Motion for Leave to Proceed in Forma Pauperis to the Clerk of the above Court, a copy of which is hereby served on you.

PATRICIA UNSINN
Assistant Defender

STATE OF ILLINOIS)
) SS
COUNTY OF COOK)

The undersigned, being first duly sworn on oath, deposes and says that she personally served a copy of the Motion for Leave to Proceed in Forma Pauperis on the Attorney General and State's Attorney by personally delivering a copy of the same at their offices to an employee in charge of acceptance of service on December 29, 1994

DORA EASON

SUBSCRIBED AND SWORN TO BEFORE ME
on December 29, 1994.

NOTARY PUBLIC

OFFICIAL SEAL
ALICIA M. CORONA
NOTARY PUBLIC, STATE OF ILLINOIS
MY COMMISSION EXPIRES 4-18-96

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